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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-1932

UNITED STATES OF AMERICA,

PETITIONER,

-vs-

GERMAN MUNOZ-FLORES,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RESPONDENT'S MEMORANDUM IN OPPOSITION

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Respondent, German Munoz-Florez, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 863 F.2d 654.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The fact that the decision below conflicts with several district court decisions outside the Ninth Circuit is an inadequate reason for granting a petition for writ of certiorari.

To date, the Ninth Circuit Court of Appeals is the only circuit court to address the constitutionality of the Special Assessments provision (18 U.S.C. § 3013) under the Origination Clause. Petitioner is correct that district courts in other circuits have split on the validity of section 3013 and that appeals are pending before several circuit courts of appeal.

(Pet. 11-12.) Rule 17 of the Rules of the Supreme Court of the United States does not provide for the granting of a petition for writ of certorari where there is a split in the district courts.

2. The decision below is not in conflict with other circuit court decisions interpreting section 3013.

Petitioner cites two circuit court decisions that concluded section 3013 was designed to provide funds for the Crime Victims Assistance Program. (See Pet. 12, citing United States v. Donaldson, 797 F.2d 125, 127 (3d Cir. 1986); United States v. Dobbins, 807 F.2d 130 (8th Cir. 1986). Both Donaldson and Dobbins are consistent with the decision below in finding that section 3013 is not a punitive measure. The issue in Donaldson and Dobbins was not the Origination Clause but whether section 3013 was a criminal statute entitled to application of the rule of lenity.

Donaldson, upon which Dobbins relied, found that section 3013 did not define a substantive criminal offense or establish a criminal sentence but rather assessed nominal amounts that were to be paid into the Crime Victim's Fund. 797 F.2d at 127; 807 F.2d at 131. Consistent with both Donaldson and Dobbins, the Ninth Circuit found the provision was not to punish offenders. (Pet. 10a, 12a.)

Petitioner also cites three circuit decisions that have concluded assessments under section 3013 were punitive. See Pet. 12, citing United States v. Davis, 845 F.2d 94, 97, n.2 (5th Cir. 1988); United States v. King, 824 F.2d 313, 317 (4th Cir. 1987); United States v. Mayberry, 774 F.2d 1018 (10th Cir. 1985).[1] These cases all concern the applicability of section 3013 assessments to convictions under the Assimilative Crimes Act. While each these cases did conclude that section 3013 was punitive, the issue was the Assimilative Crimes Act, not the Origination Clause.

1/ Interestingly, the government argued in both King and Mayberry that the assessment was not punishment.

Both King and Davis found the provision punitive for purposes of an Assimilative Crimes Act analysis but refused to decide whether it would be punitive for a rule of lenity analysis. 845 F.2d at 97, n.2; 824 F.2d at 316. The Mayberry court relied on its finding that the provision was "at least partially punitive" and that there was doubt that the sole purpose of the Act was to raise revenue. 774 F.2d at 1021. None of these decisions conflict with the decision below in that none of the courts were confronted with making a decision regarding the "primary purpose" of the assessment provision.

It is noteworthy that the decisions regarding the Assimilative Crimes Act have been rendered a nullity by Pub. L. 100-185 that amended section 3013 to provide

> (d) For purposes of this section, an offense under section 13 of this Title [The Assimilative Crimes Act] is an offense against the United States.

18 U.S.C. 3013 (as amended 1987).

3. The Court of Appeals properly applied this Court's Origination Clause decisions.

The Court of Appeals properly recognized that decisions of this Court hold that Origination Clause constraints do not extend to bills that incidentally create revenue. Pet. 6a, citing Millard v. Roberts, 202 U.S. at 436; Twin City Bank v. Nebeker, 167 U.S. at 202; United States v. Norton, 91 U.S. at 569. Those cases were properly interpreted by the Ninth Circuit to require consideration of the purpose of the special assessments legislation.

A revenue measure is one whose "direct and avowed purpose" is to "create [] revenue or public funds for the service of the government." United States v. Norton, 91 U.S. 566, 569 (1876). A revenue measure may have an incidental punitive or regulatory effect, and a regulatory or punitive measure may incidentally raise money. See generally, L. Tribe, American Constitutional Law, 319-20 (1988). The test is whether the measure raises revenue for the sake of raising revenue for governmental use, or

whether it raises revenue in the course of providing some service or achieving some proper regulatory end. When exercising powers other than the power to tax, Congress may, in establishing a government program of regulation or service, provide for the collection of fees to fund the program. Such fees are not authorized by the power to tax, but by the Article I power that authorizes the underlying Congressional action and are therefore not revenue measures. Twin City National Bank v. Nebeker, 167 U.S. 196 (1897) (Harlan, J.).

It is true that Congress provided for special assessments to be deposited into the Victims Assistance Fund. 42 U.S.C. § 10601(b)(2). Congress also mandated that "[i]f the total deposited in the fund during a fiscal year reaches the sum of $110 million, the excess over that fund shall be deposited in the general fund of the treasury and shall not be a part of the Fund."[2] 42 U.S.C. 10601(c(1). Congress therefore explicitly refused to place any ultimate limitation on use of the collected funds.

The legislative history also clarifies what the statutory language suggests:

> The purpose of imposing nominal assessment fees is to generate needed income to offset the cost of the [Crime Victims Fund . . . . Although substantial amounts will not result, these additional amounts will be helpful in financing the program and will constitute new income for the federal government.

S. Rep. No. 497, 98th Cong., 2d Sess. 13-14 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News 3607 (emphasis added). Raising money cannot be a mere incidental effect of the program to assist crime victims when Congress did not restrict the use of the monies, contemplated that the monies could be used for other purposes, and, by setting the assessment so low, could not have intended that a Crime Victims Fund would be meaningfully funded by the assets.

2/ The cap was raised by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, sec. 7121(a), 7129. See Petition 16, n.12.

4. The Special Assessment provision originated in the Senate.

There appears to be agreement that the Special Assessment provision enacted into law on October 12, 1984, was part of a Victims of Crime Assistance Bill which was added to the Comprehensive Crime Control Act of 1984. The Comprehensive Crime Control Act of 1984 was one of many unrelated titles of H.R.J. Res. 648, enacted as Pub. L. 473. At the time that H.R.J. Res. 648 was passed by the House (Sept. 28, 1984), it did not include a special assessment provision. The amendment adding a special assessment provision was tacked on by the Senate on October 4, 1984 (130 Cong. Rec. S13,520, S13,544). On October 10, 1984, the House adopted a version of the Bill, including the Senate amendments and the Senate passed it on October 11, 1984. The final version of H.R.J. Res. 648 became law on October 12, 1984.

The critical inquiry is which house voted first on the actual measure which did pass the Congress. Petitioner focuses on the language of H.R. 5690, a House bill that was passed by the House on October 2, 1984, which contains the precise special assessment language ultimately added by the Senate to H.R.J. Res. 648. However, H.R. 5690 never became law. Petitioner chooses to ignore that the Senate was the first body to pass any form of a special assessment provision which it did in S.2423 on August 10, 1984. See 1984 U.S. Code Cong. & Admin. News 3609. In actuality, the legislative history indicates the Senate's amendment to H.R.J. Res. 648 (which added the special assessments provision) was based upon legislation introduced by Senator Heinz on March 8, 1983. See 129th Cong. Rec. S.704 (daily ed. Mar. 8, 1983). The first such House initiative was introduced by H.R. 3498 on June 30, 1983.

There is no dispute that the special assessment provision of H.R.J. Res. 648 was first added by the Senate. This is precisely what is prohibited by the Origination Clause.[3]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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3/ Even if the focus is on which House first passed the particular measure that was ultimately enacted, it is clear that the Senate "initiated" special assessment legislation as far back as March 8, 1983 and was indeed the first body to pass any such legislation. Petitioner cannot have it both ways -- if predecessor legislation is relevant to inquiry under the Origination Clause, the first such legislation to be passed was S.2423.